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PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:

DelDuca et al.

Serial No.: 09/384,517

Filed: August 27, 1999

For: MODIFIED ATMOSPHERE PACKAGE

Group Art Unit: 1723

Examiner: J. Drodge

Atty. Dkt. No.: 47097-026

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REPLY TO OFFICE ACTION

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Assistant Commissioner for Patents
Washington, DC 20231

Sir:

In the office action mailed June 27, 2000, claims 16-20 and 22-25 were rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,667,827 to Breen et al. in view of U.S. Patent No. 3,419,400 to Hayhurst et al. The applicant respectfully submits that there are two independent bases for overcoming the rejection.

First, it would not have been obvious to modify Breen to include an oxygen scavenger accelerator. In determining the differences between the prior art and the claims, the claimed invention as a whole must be considered. The claimed invention is directed to a modified atmosphere package having two compartments, one containing meat, separated by a substantially permeable partition member, and is directed to a technique for reducing the

oxygen level in the meat-containing compartment below pigment sensitive levels at a rate sufficient to prevent discoloration of the meat. Spec. page 6, lines 27-28. The lower end of the pigment sensitive oxygen range is about 0.05 percent (500 ppm). Spec. page 6, lines 23-24. To accomplish the reduction in the oxygen level at a sufficient rate, an oxygen scavenger is positioned to absorb oxygen in the non-meat compartment and is activated with an oxygen scavenger accelerator. The oxygen scavenger accelerator insures that the oxygen scavenger will start to absorb residual oxygen within the package immediately after the package is sealed.

The applicant disagrees with the Office Action's assertion that it would have been obvious to modify Breen "in order to even more quickly and thoroughly remove residual oxygen to prevent damage to the packaged meat such as molding or bacterial growth." In fact, Breen's particular method of removing oxygen from its package prior to sealing would make the claimed invention unnecessary. In Breen's proposed method, the outer barrier bag 26 is first evacuated of normal atmosphere and then flushed with a preservation-enhancing gas. Column 5, lines 5-9. Breen states that *immediately after sealing its outer bag 26*, the oxygen level in the outer bag 26 is "within a range of between 30-50 ppm" and the oxygen level within the meat-containing overwrapped tray 10 is "under 250 ppm." Column 5, lines 38-46. Obviously, if the oxygen level in the overwrapped tray 10 is already under 250 ppm immediately after sealing, the oxygen level will be under 250 ppm within two to three minutes. An oxygen level of 250 ppm equates to 0.025 percent oxygen, which is already below the lower end of the pigment sensitive oxygen range of 0.05 percent. Accordingly, there would be no reason to modify Breen to include an oxygen scavenger accelerator for activating the oxygen scavenger in its outer bag 26.

Contrary to the claimed invention, Breen's objective was not to reduce the oxygen level in the meat-containing compartment below pigment sensitive oxygen levels at a rate sufficient to prevent meat discoloration. Rather, Breen's principal objective was to maximize the shelf life of packaged meat by increasing the amount of preservation-enhancing carbon dioxide surrounding the meat in an overwrapped tray. Column 2, lines 1-10. To accomplish this objective, the overwrapped tray of Breen "is 'ventilated' with strategically placed perforations which allow the preservation-enhancing gas to penetrate all enclosed regions of the ventilated overwrapped tray without clogging due to run off juices from the meat or shifting of the meat inside the tray during transport. In this way, the preservation-enhancing gas is effectively absorbed by the packaged meat product." Column 2, lines 46-53.

The foregoing objective in Breen is not promoted in any way by making the modification proposed in the Office Action. In fact, the modification proposed in the Office Action would merely add to the cost of Breen's package. Such additional cost directly undermines one of Breen's objectives, which is to provide an "inexpensive" package. In discussing the drawbacks of the prior art, Breen notes that "the addition of the special lid for forming the domed enclosure [in Garwood] increases the overall cost for the packaging over conventional plastic overwrapped trays... A less expensive packaging which also affords increased shelf life would be desirable." Column 2, lines 11-18. Certainly, if Breen considers the domed enclosure in Garwood to be too expensive compared to Breen's outer bag, Breen would not be amenable to the modification proposed in the Office Action due to its cost and, as stated above, its apparent lack of necessity in Breen's system.

Second, Breen is not prior art to the claimed invention. Enclosed herewith is a copy of a declaration under 37 CFR 1.131 filed during the prosecution of one of the parent applications. The declaration includes facts showing completion of the invention in this

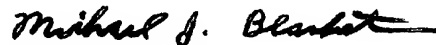
country before the filing date of Breen. The submission of a copy of the 1.131 declaration from a parent application is authorized by MPEP §201.06(c).

Claims 16-20 and 22-24 were also rejected under the judicially created doctrine of obviousness-type double patenting over claims 1-9 of U.S. Patent No. 5,948,457, claims 1-11 of U.S. Patent No. 5,811,142, or claims 1-11 of U.S. Patent No. 5,698,250. Enclosed is a terminal disclaimer and appropriate fee for overcoming this rejection.

In view of the foregoing remarks, the applicant respectfully submits that the present application is in a condition for allowance, and action toward that end is earnestly solicited.

The Commissioner is hereby authorized to charge Deposit Account No. 10-0447 (Order No. 47097-026) for any additional fees that may be required, except for the issue fee.

Respectfully submitted,



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